UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO EXCLUDE GRANTED IN PART:
June 9, 2023

CBCA 6597

ACTIVE CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Terry R. Marston II of Marston Legal, PLLC, Kirkland, WA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

**LESTER**, Board Judge.

ORDER[1]

Pending before the Board is a motion in limine through which the Federal Highway Administration (FHWA) seeks to exclude the expert report of John T. Egbert. Appellant, Active Construction, Inc. (ACI), recently brought Mr. Egbert into this case after its original

[1] This order is being published to assist in providing greater transparency to the public about the manner in which the Board has addressed issues in cases before it. Nevertheless, although single-judge orders like this one are binding in the appeals in which they are issued, they are, consistent with Board Rule 1(d) (48 CFR 6101.1(d) (2021)), not precedential in other appeals before the Board.

testifying expert, Bruce Blake, unexpectedly passed away. The FHWA complains that Mr. Egbert's analysis and conclusions differ from those of Mr. Blake in significant ways and argues that, because it had already completed expert discovery (including depositions) when Mr. Blake passed, ACI should be limited in the extent to which its replacement expert's analysis can vary from what ACI previously planned to present through Mr. Blake. For the reasons set forth below, the motion to exclude is granted in part.

## Background

This appeal involves a contract that the FHWA awarded to ACI on March 12, 2014, for the reconstruction of approximately 9.7 miles of Middle Fork Road in North Bend, Washington. On April 5, 2018, ACI submitted to the FHWA contracting officer a 222-page "consolidated" request for equitable adjustment (CREA) in which it asserted entitlement to more than $7 million in costs allegedly incurred as a result of constructive changes, differing site conditions, and delays. ACI converted the CREA to a certified claim on November 8, 2018, which the FHWA contracting officer denied by decision dated August 16, 2019.

ACI appealed the contracting officer's decision to the Board on September 9, 2019. The Board subsequently issued a scheduling order that included requirements for the identification of expert witnesses and established deadlines for the exchange of expert reports and the conclusion of fact and expert discovery. ACI designated Mr. Blake, who had been the principal author of its CREA, as its expert witness. Mr. Blake prepared an expert report, which was conveyed to the FHWA on February 28, 2021, in which, through a scheduling analysis, he determined that the FHWA was responsible for a net delay on the project of 304 calendar days plus 251 calendar days of acceleration. He opined that ACI was entitled to $7,106,396 in damages, inclusive of unresolved change request costs, home office overhead, extended home office overhead, extended field office overhead, labor inefficiency costs, and profit and bond markups. ACI also provided the FHWA with a schedule of costs, detailing ACI's claimed damages and the cost support for each category of damage, that heavily relied on Mr. Blake's report.

The FHWA deposed Mr. Blake on October 19, 2021. Although discovery concluded on October 22, 2021, the parties continued litigating discovery disputes for several months thereafter. In June 2022, once these disputes had been largely resolved, the parties jointly asked the Board to schedule a two-week hearing to begin on September 27, 2022.

On or about July 19, 2022, Mr. Blake passed away. ACI immediately notified the FWHA upon learning of Mr. Blake's death. With the FHWA's consent, the Board cancelled the scheduled hearing to provide ACI time to address the effect of Mr. Blake's passing on its case, and the Board offered, if the FHWA agreed, to allow ACI to submit the previously-received deposition testimony of its expert along with his expert report in lieu of requiring

ACI to hire and pay a new expert. On August 22, 2022, ACI informed the Board that it had decided to retain a new expert witness, Mr. Egbert, to substitute for Mr. Blake. The Board granted Mr. Egbert time to prepare a new expert report and delayed the two-week hearing by almost a year, scheduling it, at the parties' request, to begin on September 25, 2023.

When ACI announced that it was hiring a substitute expert, the FHWA raised concerns, both to ACI and the Board, about what the scope of Mr. Egbert's report would be and warned that, if Mr. Egbert went beyond the issues that were then properly before the Board and had been developed in discovery, the FWHA would seek relief from the Board. ACI asserted that the FHWA's concern "calls for no response" because ACI had "no way of knowing what [Mr. Egbert's] report will rely on," rendering the FHWA's concern "premature." ACI Letter to Counsel for the FHWA (Sept. 22, 2022) at 2.

On February 27, 2023, the FHWA received Mr. Egbert's 160-page expert report, as well as approximately seventy-one supporting exhibits containing various cost calculations and other support and a new schedule of costs detailing changes to ACI's damages and cost support. Prior to that date, ACI had not shared any specific information with the FHWA about what Mr. Egbert's report would contain. On March 31, 2023, the FHWA filed its motion to exclude portions of Mr. Egbert's report on several grounds, all of which relate to limitations that the FHWA asserts apply to substitute experts that come into the case when the original expert becomes unavailable after the conclusion of discovery: (1) that, while Mr. Blake employed a method of analysis called the "Leonard Study" to calculate ACI's loss of productivity claim, Mr. Egbert uses a different method, the "Mechanical Contractor's Association of America's Factors" (MCAA Factors), that is outside the scope of Mr. Blake's report and significantly increases the number of labor hours claimed; (2) that Mr. Egbert has added field office markups to lost labor productivity hours that Mr. Blake never identified; (3) that Mr. Egbert's report includes a new opinion about extended home office overhead that was not included in Mr. Blake's report; and (4) that Mr. Egbert's damage calculations deviate extensively from Mr. Blake's damage calculations in ways that require new discovery.

## Discussion

### I. The Standard for Excluding Substitute Expert Testimony

The purpose of a motion in limine is "to prevent a party before trial from encumbering a record with irrelevant, immaterial, or cumulative matters." *J.R. Roberts Corp.*, DOT BCA 2499, 94-2 BCA ¶ 26,645, at 132,558 (quoting *Baskett v. United States*, 2 Cl. Ct. 356, 367-68 (1983)); *see Palmerin v. City of Riverdale*, 794 F.2d 1409, 1413 (9th Cir. 1986) ("Pretrial motions are useful tools to resolve issues which would otherwise 'clutter up' the trial."). "Such a motion enables a [tribunal] to rule in advance on the admissibility of documentary

or testimonial evidence and thus expedite and render efficient a subsequent trial." *J.R. Roberts*, 94-2 BCA at 132,558 (quoting *Baskett*, 2 Cl. Ct. at 367-68).

Normally, the party seeking to exclude evidence on a motion in limine has the burden of demonstrating that "the evidence sought to be excluded is clearly inadmissible for any purpose." *Technical Systems Associates, Inc. v. Department of Commerce*, GSBCA 13277-COM, et al., 98-2 BCA ¶ 30,066, at 148,770; *see Peter Kiewit Sons' Co.*, IBCA 3535-95, et al., 00-2 BCA ¶ 31,044, at 153,303. "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). Nevertheless, where the objection is to a party's untimely disclosure of an expert witness, the party seeking to present the late-disclosed expert bears the burden of establishing substantial justification or harmlessness. *K-Con Building Systems, Inc. v. United States*, 106 Fed. Cl. 652, 660 (2012) (citing *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 221, 226 (2010); *Zoltek Corp. v. United States*, 71 Fed. Cl. 160, 167 (2006)).

Substitutions of expert witnesses are generally treated as untimely disclosures of expert testimony under Rules 26(a) and 37(d) of the Federal Rules of Civil Procedure.[2] *Baumann v. American Family Mutual Insurance Co.*, 278 F.R.D. 614, 615 (D. Colo. 2012). Rule 26(a)(2) sets forth the requirements for the disclosure of expert testimony, including the information that is to be contained in an expert report. It also provides that, "[a]bsent a stipulation or a court order, the disclosures must be made: (i) at least 90 days before the dates set for trial or for the case to be ready for trial; or (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter [as the opposing party's expert report] within 30 days after the other party's disclosure." Fed. R. Civ. P. 26(a)(2)(D). Tribunals have interpreted this rule to provide for automatic exclusion unless the failure to disclose can be shown to be substantially justified or harmless. *See, e.g.*, *Zoltek Corp.*, 71 Fed. Cl. at 167.

Obviously, the death of an expert witness provides good cause for substitution, particularly if the affected party is diligent in notifying the opposing party and the tribunal after learning of it. Tribunals "have consistently permitted the substitution of expert witnesses when unforeseen events render the original expert witness unavailable to testify at trial." *Nature's Plus A/S v. Natural Organics, Inc.*, No. CV-09-4256, 2014 WL 1296455, at *3 (E.D.N.Y. Oct. 29, 2014) (quoting *Whiteside v. State Farm Fire & Casualty Co.*, No.

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[2] Although not binding upon the Board, the Board looks to the Federal Rules of Civil Procedure for guidance and instruction. Rule 1(c); *see Gardner Zemke Co. v. Department of the Interior*, CBCA 1308, 09-1 BCA ¶ 34,081, at 168,501.

11-10091, 2011 WL 5084981, at *1 (E.D. Mich. Oct. 26, 2011)). "[T]o prevent [the appellant from] present[ing] such testimony could result in manifest injustice," *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, No. 86-2457-S, 1991 WL 205691, at *2 (D. Kan. Sept. 23, 1991), particularly here where, without expert testimony, much of ACI's claim, which relies on its expert's scheduling and labor productivity analyses, would fail for lack of proof. "Allowing substitution furthers th[e] goal of a fair contest for both parties because without the new expert the [appellant] would be punished for the death of one of its witnesses." *Morel v. Daimler-Chrysler Corp.*, 259 F.R.D. 17, 21 (D.P.R. 2009).

Nevertheless, where, as here, substitution occurs after expert discovery and depositions have already been completed, the substitution's effect on the responding party cannot be ignored. The FHWA has already dedicated extensive time, energy, resources, and cost to review, take discovery on, and develop defenses to the original expert's analysis and to prepare its own case based upon the original expert disclosures. "As long as there is no 'meaningful change in testimony,'" and the new expert "will testify on the same topics as" the original expert," the responding party should not be materially prejudiced. *Morel*, 259 F.R.D. at 21 (quoting *Ferrara & DiMercurio v. St. Paul Mercury Insurance Co.*, 240 F.3d 1, 10 (1st Cir. 2001)). "Prejudice may arise," however, "when a party is surprised with new theories of liability or a new subject matter after the deadlines for discovery have passed." *Id.*

To balance the affected party's need for expert testimony against possible prejudice to the responding party from the late substitution, tribunals "generally limit the scope of the testimony that may be given by the substitute expert . . . to the subject matter and theories already espoused by the former expert." *Shipp v. Arnold*, No. 4:18-cv-4017, 2019 WL 4040597, at *2 (W.D. Ark. Aug. 27, 2019) (quoting *Lincoln National Life Insurance Co. v. Transamerica Financial Life Insurance Co.*, No. 1:04-CV-396, 2010 WL 3892860, at *2 (N.D. Ind. Sept. 30, 2010)). "The purpose of allowing substitution of an expert is to put the movant in the same position it would have been in but for the need to change experts; it is not an opportunity to designate a 'better' expert who holds differing or more advantageous opinions than the first expert." *Id.*

"This is not to say that the new expert must 'simply adopt the prior expert's conclusions verbatim—in effect, doing little more than authenticating and confirming the prior expert's conclusions.'" *Shipp*, 2019 WL 4040597, at *3 (quoting *Lincoln National*, 2010 WL 3892860, at *2). The purpose of having a testifying expert witness in the first place is to assist the trier of fact, Fed. R. Evid. 702 advisory committee notes to 1972 proposed rules, and a substitute expert who rotely regurgitates what another expert prepared is unlikely to serve that purpose effectively. Accordingly, a substitute expert "should have the opportunity to express his opinions in his own language after reviewing the evidence and performing whatever tests prior experts on both sides were allowed to perform," *Morel*, 259

F.R.D. at 22; *see National Life Insurance Co.*, 2010 WL 3892860, at *3, but, out of fairness to the responding party, only if, absent a showing of good cause for a contrary result, "the new opinion is substantively similar and not contrary to or inconsistent with the original opinion." *Sikkelee v. Precision Airmotive Corp.*, No. 4:07-CV-00886, 2021 WL 392101, at *5 (M.D. Pa. Feb. 4, 2021) (quoting *Shipp*, 2019 WL 4040597, at *3 (internal quotation marks omitted)); *see Noffsinger v. Valspar Corp.*, No. 09 C 916, 2013 WL 12340488, at *6 (N.D. Ill. Jan. 4, 2013) (The substituting expert's testimony is generally limited to the same subject matter as the prior expert, without "meaningful changes.").[3]

## II. The FHWA's Objections to Mr. Egbert's Substitute Report

### A. Mr. Egbert's Loss of Productivity Analysis

To limit the prejudice and surprise to the party against whom the deceased witness was to have testified, substitute expert witnesses generally must use the same methodology as the original expert. *See Lincoln National Life Insurance Co.*, 2010 WL 3892860, at *3 ("Transamerica's new expert is required to employ the same general methodology as [the prior expert]—that is, a damages calculation that is based on the factors set forth in [a prior court decision]."). However, the substitute expert's analysis may contain elements not found in the original report's analysis if these elements support the original report's conclusions. *See In re Northrop Grumman ERISA Litigation*, No. CV 06-06213-AB (JCX), 2017 WL 11685251, at *5 (C.D. Cal. Mar. 3, 2017) (allowing the substitute witness to cite an additional report that supported the original report's conclusion).

In both the CREA and his expert report, Mr. Blake utilized the "Leonard Study" to calculate ACI's loss of productivity. That method of analysis "focuses on the overall change order hours as a percent of the overall labor hours and correlates that percent to a productivity loss factor." Exhibit 149 at 152. The parties plainly spent significant time during discovery addressing the Leonard Study, as the Rule 4 appeal file contains the study itself and numerous exhibits showing Mr. Blake's development of his model, and the FHWA's own expert witness provides a detailed response in his own report criticizing Mr. Blake's Leonard Study analysis. Mr. Egbert, noting in his substitute report that the FHWA had expressed a "belief that the Leonard Study was not a reliable method for estimating a productivity loss," *id.* at 140, elected to utilize a different analytical method, the

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[3] Even a dissimilar opinion will not be automatically excluded if the party seeking to introduce it can show that a balance of factors—a lack of prejudice to the opposing party, the importance of the new opinion, and valid reasons for the prior nondisclosure of the opinion—weighs in its favor. *United States v. Leebcor Services, LLC*, No. 4:20-cv-179, 2022 WL 3337795, at *2-3 (E.D. Va. Feb. 18, 2022).

MCAA Factors, which "analyze[s] and reasonably estimate[s] productivity losses" under four factors (reassignment of manpower, concurrent operations, site access, and dilution of supervision). *Id.* The results of Mr. Egbert's MCCA Factors analysis differ from Mr. Blake's Leonard Study analysis, as Mr. Egbert's analysis adds 3198 labor hours to ACI's lost productivity claim beyond what Mr. Blake had identified.

The FHWA has already devoted significant resources to digesting, evaluating, and responding to ACI's "Leonard Study" analysis, and, had Mr. Blake not passed away, that is the one that ACI would have presented at hearing. "As a matter of fairness, the death of a party's expert 'should not be a windfall'" for the affected party through which it gets to abandon or change analytical methods that the opposing party has criticized. *Stratton v. Thompson/Center Arms, Inc.*, 608 F. Supp. 3d 1079, 1088 (D. Utah 2022) (quoting *Baumann*, 278 F.R.D. at 616). "If a replacement expert uses new methods that the original expert did not use, testimony arising from those methods [is] typically precluded." *Id.* ACI has not identified any reason why its original expert could not have analyzed labor inefficiency using the MCAA Factors. Permitting this new analysis "would allow [ACI] to benefit from the passing of [its] expert by designating a 'superior expert' with additional methods and means of analysis." *Id.* "Allowing that would frustrate the rationale behind allowing a replacement expert and provide a windfall to [ACI]." *Id.*

Accordingly, Mr. Egbert's MCAA Factors analysis is excluded. Mr. Egbert may amend his report to include an analysis employing the Leonard Study, but any such analysis cannot be used to increase the number of productivity hours allegedly lost and for which ACI claims the FHWA is responsible.

B. Mr. Egbert's Addition of Markups for Small Tools and Safety

In addition to complaining about Mr. Egbert's MCAA Factors approach in performing his loss of productivity analysis, the FHWA also complains that Mr. Egbert has added markups of 3% for small tools and 2% for safety to the labor hours identified in that analysis, something that Mr. Blake did not do. Respondent's Motion in Limine at 8. Although the FHWA asserts that the basis of these markups is unclear, Mr. Egbert explains in a declaration accompanying ACI's April 17, 2023, response to the FHWA's motion that these new markups "relate[] to the Board's dismissal of ACI's claim for extended field office overhead using a per diem rate while allowing its continued use of markups on changes." Egbert Declaration (Apr. 14, 2023) ¶ 6. Specifically, in the CREA and his original expert report, Mr. Blake charged extended field office overhead as a direct cost, but, by decision dated March 9, 2022, the Board held (in response to an earlier dispositive motion) that, because ACI had charged field office costs as indirect expenses throughout contract performance, it could not, under Federal Acquisition Regulation (FAR) 31.105(d)(3) (48 CFR 31.105(d)(3) (2014)), switch accounting practices and charge them as direct expenses in its claim. *Active*

*Construction, Inc. v. Department of Transportation*, CBCA 6597, 22-1 BCA ¶ 38,070, at 184,853-56.

In our March 9, 2022, decision, we stated that "ACI may continue to apply a field office overhead markup to the direct cost claims that it is asserting in this appeal." *Active Construction*, 22-1 BCA at 184,856. Given that direction, had ACI's original expert asked after we issued that decision, we would have allowed him to modify his report to convert field office costs that he had identified as direct costs into indirect cost markups, as appropriate. To the extent that Mr. Egbert is performing the work that we would have allowed Mr. Blake to undertake, we will not preclude Mr. Egbert from addressing those indirect cost markups.

C. Mr. Egbert's Extended Home Office Overhead Opinion

The FHWA complains that Mr. Egbert has included opinions in his report about ACI's *Eichleay* claim that Mr. Blake did not offer, first offering opinions about what the law surrounding *Eichleay* claims is and then offering a new factual analysis regarding how the home office overhead allocated in ACI's bid had been "used up" before the revised contract completion date to support a new theory of home office overhead recovery. With regard to Mr. Egbert's views on *Eichleay* law, including his view that "'[t]he method of calculating damages under *Eichleay* is logical and rational," Exhibit 149 at 159, the Board does not need and will not accept testimony on what the law is or how the Board should interpret past precedential court decisions. *See Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 510 (2d Cir. 1977) ("[E]xpert testimony on law is excluded because the tribunal does not need the witness' judgment." (internal quotation marks and citation omitted)). With regard to Mr. Egbert's new factual theory in support of ACI's home office overhead claim, ACI does not explain why it could not have raised this theory as part of Mr. Blake's analysis. As previously noted, the death of a party's expert is not supposed to result in a windfall for the affected party. *Stratton*, 608 F. Supp. 3d at 1088. It is too late for ACI to raise a new home office overhead argument through its substitute expert.

D. Mr. Egbert's Damages Calculations

The FHWA argues that Mr. Egbert has modified the damage calculations that Mr. Blake presented "in substantial ways," reducing or withdrawing seventeen categories of damage but substantially increasing three categories. Respondent's Motion in Limine at 9-10. It asks that the entirety of "Mr. Egbert's report . . . be excluded given the extensive deviations from Mr. Blake's original report and conclusions." *Id.* at 11.

"[M]otions in limine should rarely seek to exclude broad categories of evidence, as the [tribunal] is almost always better situated to rule on evidentiary issues in their factual

context during trial." *Colton Crane Co. v. Terex Cranes Wilmington, Inc.*, No. CV-08-8525, 2010 WL 2035800, at *1 (C.D. Cal. May 19, 2010); *see Lego v. Stratos International, Inc.*, No. C-02-03743, 2004 WL 5518162, at *1 (N.D. Cal. Nov. 4, 2004) (denying motion in limine to preclude opinion testimony by any person who was not properly disclosed as an expert as "too vague"). Here, the FHWA fails to provide any real detail about the changes to Mr. Blake's damages calculations or to identify whether Mr. Egbert employs a different methodology than Mr. Blake. As previously discussed, the substitute expert is not completely wedded to the exact language or structure of the prior expert's report or analysis and has some discretion to make the analysis his or her own. *See, e.g.*, *United States v. Leebcor Services, LLC*, No. 4:20-cv-179, 2022 WL 3337795, at *2-3 (E.D. Va. Feb. 18, 2022); *National Life Insurance*, 2010 WL 3892860, at *3; *Morel*, 259 F.R.D. at 22. The FHWA's allegations are too vague for a motion in limine. Accordingly, we deny the FHWA's request that we exclude Mr. Egbert's damage calculations at this time. The FHWA will have the opportunity to raise these objections at the proper time at the hearing.

## III. The FHWA's Request to Exclude the CREA and Mr. Blake's Expert Report

Under Board Rule 4(g) (48 CFR 6101.4(g) (2021)), "[t]he Board considers appeal file exhibits part of the record for decision under Rule 9(a) unless a party objects to an exhibit within the time set by the Board and the Board sustains the objection." Mr. Blake's expert witness report and the CREA that he helped draft are currently a part of the Rule 4 appeal file.

Because Mr. Blake prepared his expert report and its supplements with the expectation of using them to support live testimony that cannot now be presented, and because ACI has now substituted a new expert who has prepared his own extensive report, the Board will not rely on Mr. Blake's report as substantive evidence in this appeal. To the extent that either party needs to reference the report or its supplements during the hearing, the Board will address any objections during the hearing as the need arises.

With regard to the FHWA's request to exclude the CREA, it is the certified claim that ACI submitted to the contracting officer—the foundation of the Board's CDA jurisdiction to entertain this appeal. *See Bowers Investment Co. v. Department of Transportation*, CBCA 825, 08-1 BCA ¶ 33,783, at 167,202 ("The CDA requires that a claim by a contractor be filed with the contracting officer as a prerequisite to the Board's jurisdiction."). In addition, ACI notes that other individuals beyond Mr. Blake worked in preparing the CREA. It remains a part of the Rule 4 appeal file.

To the extent that the FHWA has raised other objections to Mr. Egbert's report, they are denied because they either are moot or lack merit.

Decision

As discussed above, the FHWA's motion in limine to exclude Mr. Egbert's expert report is **GRANTED IN PART**.

*Harold D. Lester, Jr.*
HAROLD D. LESTER, JR.
Board Judge